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No. 82-1109

In the Supreme Court of the United States

OCTOBER TERM, 1982

KEARNEY & TRECKER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's accelerated delivery directive under the Defense Production Act of 1950, which caused petitioner to lose a contract with Rolls Royce, was a "taking" compensable under the Fifth Amendment.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1-9) is reported at 688 F.2d 780.

JURISDICTION

The judgment of the Court of Claims was entered on September 8, 1982 (Pet. App. 9). A petition for rehearing was denied on September 30, 1982 (Pet. App. 10). The petition for a writ of certiorari was filed on December 29, 1982. The jurisdiction of this Court is invoked under former 28 U.S.C. 1255(1).[1]

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[1]28 U.S.C. 1255 was repealed effective October 1, 1982, by Sections 123 and 402 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 36, 57. Although the judgment of the Court of Claims was rendered prior to that date, the petition was not filed until after Section 1255 had been repealed. In addition, none of the provisions of Section 403 of the Federal Courts Improvement Act, which

STATEMENT

1. The Defense Production Act of 1950 ("DPA"), 50 U.S.C. (& Supp. IV) App. 2061 *et seq.*, authorizes the President to require that priority be given to "contracts or orders * * * which he deems necessary or appropriate to promote the national defense * * *." 50 U.S.C. App. 2071(a)(1). That authority, delegated to the Department of Commerce by Exec. Order No. 10,480, 3 C.F.R. 962 (1949-1953 Compl.), has been implemented by regulations promulgated by the Department's Office of Industrial Mobilization ("OIM").[2] The regulations involved in this case, known as the Defense Priorities System ("DPS"), allow contracts and orders to be rated in one of two ways, each of which gives the rated order priority over unrated orders. 15 C.F.R. Part 350, Sections 3-5. The regulations also provide that a directive takes precedence even over other rated orders. *Id.* Section 5.

2. On December 21, 1979, Lockheed-California Co. ("Lockheed") issued a purchase order requesting petitioner to deliver a 5-Axis Modu-Line Traveling Column Machining Center ("Modu-Line")[3] by December 15, 1981. Lockheed ordered its Modu-Line for use in a classified contract

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governs the transfer of pending cases from the Court of Claims, appears to address the availability of certiorari review of cases decided prior to October 1, 1982, but not filed in this Court until after that date. Nevertheless, we assume that for purposes of certiorari review this case may be deemed to have been automatically transferred to the new Federal Circuit on October 1, 1982, and that the jurisdiction of this Court may therefore properly be invoked under 28 U.S.C. 1254(1).

[2]OIM was redesignated the Office of Industrial Resource Administration effective September 18, 1981.

[3]Metalworking machines including machining centers are covered by the DPS. See 15 C.F.R. Part 353 sched. I.

with the Air Force (App. 1-7).[4] During the summer of 1980, the Air Force determined that the project underlying its contract with Lockheed was urgent. As a result, on September 17, 1980, Lockheed gave its purchase order a priority rating and accelerated the delivery date to June 1981 (Pet. App. 2; App. 20).[5] See 15 C.F.R. Part 350, Section 7.

Soon after receiving Lockheed's rated order, petitioner's Sales Office Manager, Eugene Zentz, telephoned OIM. Zentz noted that Modu-Lines were complex, made-to-order machinery that took up to six months to manufacture. He suggested that accelerated delivery of Lockheed's Modu-Line might have an effect on petitioner's unrated commercial orders. Zentz was invited to visit OIM to discuss the effect a June 1981 delivery date would have on petitioner's customers (App. 3-5). On October 3, 1980, Zentz advised OIM by letter that rescheduling Lockheed's order would delay manufacture of several commercial customers' machines by at least five months (*id.* at 9).

After considering petitioner's concerns, OIM on November 6, 1980, telexed a directive to petitioner ordering delivery of Lockheed's Modu-Line by June 30, 1981. On November 12, 1980, petitioner accepted the directive (Pet. App. 4).

Three months later petitioner informed OIM that Rolls Royce, one of its commercial customers, would cancel its order because of the additional delay purportedly caused by

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[4]"App." refers to the documents set out in a separate appendix that we have lodged with the Clerk of this Court and served on counsel for petitioner. These documents were part of the administrative record filed in the Court of Claims.

[5]Petitioner had previously received several other higher rated orders for Modu-Lines to be produced for Chrysler Corporation (Pet. App. 3-4).

the accelerated delivery directive.[6] Petitioner warned OIM that it would look " 'to the government * * * for the reimbursement of all financial loss and damages' " occasioned by the directive (Pet. App. 4). OIM, in a letter dated March 12, 1981, denied that the government was liable for damages and called petitioner's attention to the administrative procedure described in DPS Section 26(a), 15 C.F.R. Part 350 (App. 18).[7]

3. Petitioner filed suit in the Court of Claims seeking to recover $434,596 (Pet. App. 4). It claimed that the directive by OIM was a taking of its property for which the Fifth Amendment required payment of just compensation. Petitioner argued that the government had taken both its contract with Rolls Royce and the Modu-Line delivered to Lockheed. The United States moved for summary judgment, arguing that petitioner had suffered no loss other than consequential damages not compensable under the Fifth Amendment. The government also urged that the petition should be dismissed because petitioner had failed to exhaust its administrative remedies.

The Court of Claims granted the government's motion for summary judgment. The court began by noting: "The plaintiff does not contend that it was unaware when it

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[6]Rolls Royce's order was originally scheduled for delivery in January 1981. As a result of a strike at petitioner's plant, the Rolls Royce order was rescheduled for delivery in September 1981 (Pet. 3). When expedited delivery was directed for Lockheed's machine, the Rolls Royce order was pushed back five more months.

[7]Section 26(a) provides that any person who is issued a directive may submit a request for adjustment if he believes "that such provision works an undue or exceptional hardship upon him not suffered generally by others in the same trade or industry, or that its enforcement against him would not be in the interest of national defense or in the public interest." Section 26(b) (15 C.F.R. Part 350) provides for appeal from an adverse decision on a request for adjustment.

accepted the Lockheed order in 1979 that the government could expedite delivery under the Act" (Pet. App. 3). The court went on to hold that if a taking of the Modu-Line intended for Rolls Royce had occurred, petitioner had received just compensation for the machine itself (*id.* at 5-6). The court also held that petitioner's loss of the expected benefit from its contract with Rolls Royce was not one that warranted just compensation (*id.* at 7-9). Relying on this Court's decision in *Omnia Commercial Co.*, v. *United States*, 261 U.S. 502 (1923), the Court of Claims concluded that "the fifth amendment covers only direct appropriations of private property and not 'consequential loss or injury resulting from lawful governmental action' " (Pet. App. 8, quoting 261 U.S. at 510).

ARGUMENT

1. The issues presented by the petition involve the application of settled law to the facts of this case, and pose no question warranting this Court's review. Petitioner no longer contends—as it did in the Court of Claims—that the accelerated delivery directive was a taking of the Modu-Line itself. Instead, petitioner now argues that "[t]he Directive * * * seized petitioner's * * * investment backed 'production facilities' and expectations, with the damages measured by the lost contract it had with Rolls Royce" (Pet. 6). The government did not, of course, take over petitioner's facilities in any way. In essence all that petitioner claims is that it is entitled to the expected profits from a lost contract.

As the court below correctly concluded, this Court and the Court of Claims have consistently held that the Fifth Amendment does not mandate compensation for lost profits. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871); *Omnia Commercial Co.*, v. *United States, supra*; *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925); *R.J. Widen Co.* v. *United States*, 357 F.2d 988, 994 (Ct. Cl. 1966); *Georgia-Pacific Corp.* v. *United States*, 640 F.2d 328, 361 n.44 (Ct.

Cl. 1980); *T.O.F.C., Inc.* v. *United States*, 683 F.2d 389, 395-396 (Ct. Cl. 1982). See also 4 J. Sackman, *Nichols on Eminent Domain* § 13.33 (3d ed. 1981). In *Mitchell* v. *United States, supra*, 267 U.S. at 345, this Court defined unrecoverable consequential damages as losses that are "an unintended incident" of the actual taking by the government. Similarly, in *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281-282 (1943), the Court explained:

> There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. * * * [T]he sovereign must pay only for what it takes, not for opportunities which the owner may lose.

In *Omnia Commercial Co., Inc.* v. *United States, supra*, the claimant had a favorable contract to purchase a large quantity of steel plate from a steel producer at below market value. Before any steel had been delivered to Omnia the government requisitioned the manufacturer's entire production for the year and directed the manufacturer not to comply with the terms of Omnia's contract. Subsequently, Omnia sued the government for just compensation, contending that by requisitioning the steel the government had appropriated for public use Omnia's contractual right to the steel. This Court rejected Omnia's claim. It found that although the government had frustrated performance of a contract favorable to Omnia, there had been no compensable taking. The Court characterized Omnia's frustrated business opportunity as an unrecoverable "consequential loss or injury resulting from lawful governmental action * * *." 261 U.S. at 510.

This case is no different. Rather than requisitioning petitioner's entire production, the government simply directed accelerated delivery of a Modu-Line for which Lockheed had already contracted. Petitioner's loss of the benefit of its contract with Rolls Royce is no less "consequential" than

Omnia's loss—it is simply a frustrated business opportunity resulting from lawful government action. Moreover, contrary to petitioner's contention (Pet. 7-8), it is of little import that in this case the manufacturer, rather than the purchaser, complains that the contract was frustrated. Whether the consequential harm is suffered by one party rather than the other is purely a matter of happenstance, depending on which way shifting market forces have tilted the benefit of the bargain. Had the market price of steel dropped below the contract price in *Omnia*, it would have been the manufacturer rather than the buyer who complained of a "taking"; but the government's action and the nature of the loss would have been the same.

Nor is the decision in this case at odds with *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949). In *Kimball* the Court held that when the government appropriates a claimant's entire business, the Fifth Amendment may require compensation for intangible assets such as going-concern value. That very principle was explicitly acknowledged in *Omnia* itself. 261 U.S. at 513. The difference between *Kimball* and this case is that going-concern value is "not merely a contract in respect of the property taken, but * * * an integral part of it" (*ibid.*).

The decision below is distinguishable from *Kimball* in another, and equally important, respect. As the Court of Claims noted, petitioner "does not contend that it was unaware when it accepted the Lockheed order in 1979 that the government could expedite delivery under the Act" (Pet. App. 3). And as this Court has observed in another context, "businessmen engaged in * * * federally * * * regulated enterprises accept the burdens as well as the benefits of their trade * * *." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973). Unlike the claimant in *Kimball*, whose laundry was condemned for wartime use, petitioner voluntarily entered into a contractual agreement that, pursuant

to the governing statute and regulations, might have to be performed more quickly than originally ordered. In accepting the government's original order petitioner must have foreseen that its production schedule would have to be rearranged if it received a DPS directive.

2. Not only was the loss of petitioner's contract with Rolls Royce not a compensable taking; it also was a result that might have been avoided if petitioner had pursued the administrative remedies available to it. 15 C.F.R. Part 350, Section 26 (Pet. App. 46-47) provides:

> (a) Any person subject to any provision of this regulation may submit a request for adjustment or exception to BDC[8] upon the ground that such provision works an undue or exceptional hardship upon him not suffered generally by others in the same trade or industry, or that its enforcement against him would not be in the interest of the national defense or in the public interest. * * * Each request shall be in writing, by letter in triplicate, addressed as provided in section 27(a) of this regulation, and shall set forth all pertinent facts and the nature of the relief sought, and shall state the justification therefor.
>
> (b) Any person may appeal to the Appeals Board for the Department of Commerce from an adverse decision against him by BDC pursuant to this regulation.

This section was designed to afford an administrative remedy for problems like those that underlie petitioner's claim. Although there is no provision for monetary relief, it is possible to secure an "adjustment or exception" to the

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[8]The Bureau of Domestic Commerce's ("BDC") authority has been assumed by the Office of Industrial Resource Administration.

terms of a directive—such as a change in delivery date—in order to avoid consequential losses.

In this case petitioner was invited by the government to discuss the impact a June 1981 delivery date would have on its commercial orders (App. 5, 10). It also was informed that Section 26(a) provided for formal submission of a request for adjustment or exception (App. 18). Petitioner followed neither of those approaches, nor did it seek review of the directed delivery date from the Appeals Board for the Department of Commerce. Under these circumstances, petitioner is ill situated to complain of a loss that it might have avoided.

3. Petitioner's assertion of the significance of this case for "every manufacturer * * * under [the] Defense Production Act of 1950" (Pet. 10) is belied by its own recognition that "this is a case of first impression" (*id.* at 4). That no similar claim has arisen in the three decades since passage of the Act is in part explained by the settled state of Fifth Amendment law respecting claims for lost contracts. Petitioner's claim is further undermined by 15 C.F.R. Part 350, Section 26, which is designed to avoid the imposition of undue or exceptional hardship on manufacturers affected by directives and rated orders. Those who diligently pursue that remedy may avoid the problems that petitioner has brought upon itself.[9]

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[9]Where implementation of a directive does require the displacement of other commercial orders, 15 C.F.R. Part 350, Section 24 protects the manufacturer against liability to disappointed customers. It provides that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any BDC regulation, order, direction, directive, or other written instruction * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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